Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1210

In the Supreme Court of the United States

OCTOBER TERM, 1988

HUMBERTO RIVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether petitioner's rights under the Confrontation Clause were violated by the admission at trial of depositions taken, pursuant to 18 U.S.C. 3144 (Supp. IV 1986) and Fed. R. Crim. P. 15(a), from illegal alien witnesses who voluntarily departed the United States prior to petitioner's trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 859 F.2d 1204.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1988. On December 16, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 22, 1989. The petition was filed on January 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on nine counts of transporting illegal aliens, in vio-

lation of 8 U.S.C. 1324(a)(1)(B) (Supp. IV 1986). Petitioner was sentenced to concurrent three-year terms of imprisonment on each of the nine counts, but the sentence was suspended except for that portion equal to the time that petitioner had already been incarcerated. Petitioner was also placed on concurrent three-year terms of probation. The court of appeals affirmed (Pet. App. 1a-12a, 27a-28a).

1. The evidence at trial is summarized in the government's brief in the court of appeals. It showed that on August 5, 1987, special agents of the United States Immigration and Naturalization Service (INS) executed a search warrant at a work site of the Blazer Construction Company in Woodbridge, Virginia, and arrested 47 illegal aliens at the site. Petitioner was a labor foreman at the work site and had arrived there that day with a carload of illegal aliens. After receiving *Miranda* warnings, petitioner admitted to the agents that he had harbored illegal aliens at his apartment. Gov't C.A. Br. 2-3; C.A. App. 123-124, 151-152, 161-162, 240-241.

Petitioner took the stand at trial and admitted that he had transported a number of aliens to work in Virginia and that he had also transported aliens from Ohio to Virginia. Initially, he denied knowing that the aliens were illegal, but he finally admitted that he was aware that one of his passengers, Nicholas Guerro-Avila, was an illegal alien. Petitioner also admitted that he had cashed checks for a number of the aliens because they had had no personal identification. Gov't C.A. Br. 7-8; C.A. App. 282-283.

2. For three weeks following petitioner's arrest, the government incarcerated six aliens as material witnesses to testify against petitioner. Counsel for the aliens then moved to have the aliens' depositions taken pursuant to the provisions of the material witness statute, 18 U.S.C.

3144 (Supp. IV 1986),[1] and Fed. R. Crim. P. 15.[2] Counsel also moved for the aliens' release from incarceration. Pet. App. 14a-17a. The government supported and petitioner opposed the motion (*id.* at 15a-18a). The district court granted the motion, concluding that "[e]xceptional circumstances have been shown in that the witnesses are being incarcerated awaiting a trial. And humanitarian considerations alone demand that something be done to release them from incarceration, when their only purpose of being incarcerated is to be witnesses" (*id.* at 18a).

Pursuant to the court's order, the aliens were deposed. Petitioner and his counsel were present, and they extensively cross-examined the witnesses. Thereafter, rather than face formal deportation proceedings, the aliens elected to depart the country pursuant to 8 C.F.R. 242.5. The INS returned the aliens to their native country of Mexico. Gov't C.A. Br. 4.

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[1] 18 U.S.C. 3144 (Supp. IV 1986) provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[2] Fed. R. Crim. P. 15(a) provides in relevant part:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notices to the parties order that testimony of such witness be taken by deposition * * *.

At trial, the government introduced deposition testimony taken from three of the aliens. In the first of the depositions, Wilfrido Campos-Gonzalez testified that he had worked with petitioner in Ohio and that they had driven together to Virginia. Campos-Gonzalez also explained that he and several other illegal aliens had lived with petitioner. Because the deposition testimony of the other two aliens was similar, only selected portions of those depositions were read to the jury. Gov't C.A. Br. 4, 6-7.

3. The court of appeals affirmed, holding that the admission of the deposition testimony did not violate petitioner's Sixth Amendment right to confront the witnesses against him (Pet. App. 1a-12a). The court found that the alien witnesses were "unavailable" to testify, explaining that the government had acted reasonably in agreeing to depose the aliens and thereafter permitting them to depart the country (*id.* at 9a). The court noted that the government had the " 'dual responsibility' " both to prosecute the present case and to enforce the immigration laws—which included, in this instance, the " 'obligat[ion] to deport' " the illegal aliens (*id.* at 8a, quoting *United States* v. *Valenzuela-Bernal,* 458 U.S. 858, 864 (1982)). Moreover, the court stated, "[i]f the [trial] court had denied the motion for depositions, these alien material witnesses would have been incarcerated for more than three months, even though they were neither indicted nor convicted of a crime" (Pet. App. 7a). In any event, the court reasoned, petitioner had "made no showing that he [was] denied testimony favorable to him, nor ha[d] he shown that the deposition testimony was any different from what the live testimony of the witnesses would have been" (*id.* at 9a). Moreover, the court found that petitioner's "suggestions * * * as to how the presence of the illegal aliens could have

been assured at trial [were] all unrealistic and totally lacking in merit" (*id.* at 10a).[3]

ARGUMENT

Petitioner contends (Pet. 7-16) that the admission of the aliens' deposition testimony violated his rights under the Confrontation Clause of the Sixth Amendment. The court of appeals correctly rejected that claim, and its decision warrants no further review.

The Confrontation Clause permits the introduction of prior testimony of a declarant who is not present at trial when two conditions have been satisfied: (1) the declarant is unavailable to testify at trial; and (2) the testimony bears sufficient indicia of reliability. *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972). The second condition is easily met in this case. The witnesses were under oath at the time they were deposed; petitioner was present at the depositions and was represented by counsel; there was adequate opportunity for cross-examination; and a complete record was made of the testimony.

Moreover, the court of appeals correctly found that the aliens were "unavailable" to testify at trial, and thus the first condition of admissibility is satisfied as well. To be sure, "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968). Accord *Roberts*, 448 U.S.

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[3] The court of appeals also rejected petitioner's challenge to the jury instructions (Pet. App. 11a), as well as his contention that the district court had improperly restricted the evidence and the arguments that could be offered at trial (*id.* at 11a-12a). The petition does not present those issues.

at 74; *California* v. *Green,* 399 U.S. 149, 161-162, 165, 167 n.16 (1970). But " '[t]he lengths to which the prosecution must go to produce a witness * * * is a question of reasonableness.' " *Roberts,* 448 U.S. at 74, quoting *Green,* 399 U.S. at 189 n.22. The government's actions in the present case were plainly reasonable. As this Court recognized in *Valenzuela-Bernal,* illegal immigration has become a "colossal" national concern, and "Congress has determined that prompt deportation * * * constitutes the most effective method for curbing the enormous flow of illegal aliens" across the border (458 U.S. 864 & n.5). Thus, in cases like the present one, "[t]he Government may * * * find itself confronted with the obligation of prosecuting persons [charged with transporting illegal aliens], and at the same time obligated to deport other persons involved in the event in order to carry out the immigration policies that Congress has enacted" (*id.* at 864). The detention of alien witnesses imposes "substantial financial and physical burdens upon the Government," and also involves "the human cost to potential witnesses who are incarcerated though charged with no crime" (*id.* at 865).

In light of those competing obligations, the government did not violate its duty to make a "good-faith effort[ ]" to produce the alien witnesses. *Ohio* v. *Roberts,* 448 U.S. at 74. While the government may have had the power to incarcerate the aliens until trial, it did not act unconstitutionally in declining to exercise that power, in deference to its duties to deport the aliens promptly and to address the "humanitarian considerations" (Pet. App. 18a) presented by their indefinite incarceration. In sum, the government's "exercise of [its] manifold responsibilities is not to be judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses." *Valenzuela-Bernal,* 458 U.S. at 866. Accord *United States* v. *Terrazas-Montano,* 747 F.2d 467,

469 (8th Cir. 1984) (videotaped depositions taken from aliens who were thereafter deported held admissible at trial, because "the witnesses were unavailable, under circumstances which reflect no bad faith on the part of the government"); *United States* v. *Seijo,* 595 F.2d 116, 120 (2d Cir. 1979) (quoting Fed. R. Evid. 804(a)) (depositions taken from aliens who were thereafter deported held admissible at trial, because "there is no evidence that the deported aliens were absent due to 'the procurement or wrongdoing' of the Government 'for the purpose of preventing [those deposed] from attending or testifying' ").[4]

The court of appeals' decision is not in conflict with the Fifth Circuit's decision in *United States* v. *Guadian-Salazar,* 824 F.2d 344 (1987). In that case, depositions were taken from illegal aliens, over the government's objection, pursuant to a standing order of the district court requiring "alien material witnesses to be deposed and released within sixty days of the date of their detention" (*id.* at 345). The aliens were thereafter deported and the depositions were admitted at trial. Because those procedures had been followed pursuant to a standing order of

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[4] As the court of appeals recognized, petitioner's suggestions as to how, other than by incarceration, the aliens' appearance at trial could have been assured were "unrealistic" (Pet. App. 10a). Petitioner suggested, for example, that the aliens should have been subpoenaed before their departure and ordered to reappear for trial (C.A. Br. 27). That surely would have been a "futile act," since by the time of trial, the aliens would have been thousands of miles away, and there would have been no mechanism for enforcing the subpoena. See *Ohio* v. *Roberts,* 448 U.S. 56, 74 (1980). Petitioner also suggested (C.A. Br. 29) that under the material witness statute, 18 U.S.C. 3144 (Supp. IV 1986), the aliens might have been placed on bond. But releasing the witnesses would surely have been inconsistent with the government's responsibility to remove illegal aliens from the community, and the district court correctly recognized that the aliens might flee when released (C.A. App. 58).

the court, the government concluded that the trial court had "exercised no discretion" in the case, and the government therefore confessed error on appeal. The Fifth Circuit accepted the government's confession and reversed the defendant's conviction (*id.* at 347).

The present case is easily distinguishable. Here, unlike in *Guadian-Salazar,* the district court did not proceed under a standing order, but instead responded to a motion by the aliens themselves to be deposed and deported. Counsel for the aliens informed the court of specific factors, such as the length of incarceration and the aliens' family circumstances (Pet. App. 16a-17a), that justified the taking of depositions and the subsequent deportation. In granting the motion, the district court exercised its discretion in an appropriate fashion, and petitioner has made no showing of prejudice from the admission of deposition testimony.[5]

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[5] Petitioner relies (Pet. 10-13) on the decisions in *United States* v. *Mann,* 590 F.2d 361 (1st Cir. 1978), and *United States* v. *Rothbart,* 653 F.2d 462 (10th Cir. 1981), both of which rejected the government's use of deposition testimony at trial. Neither of those cases, however, involved illegal aliens as witnesses, and thus neither presented the government with the competing law enforcement obligations recognized by this Court in *Valenzuela-Bernal.* Moreover, in the *Mann* case the First Circuit found that the government had "abused" the deposition process under Fed. R. Crim. P. 15 (590 F.2d at 368), and in *Rothbart* the Tenth Circuit concluded that the record showed that the government had "wrongfully procured [the witness's] absence for the purpose of preventing the witness from attending or testifying" (653 F.2d at 465). No such allegations can be made in the present case. Finally, the trial court in this case did not base its decision on any " 'generalized finding' " (Pet. 16), such as the one rejected by this Court in *Coy* v. *Iowa,* No. 86-6757 (June 29, 1988), slip op. 8. To the contrary, the court entertained the arguments of the witnesses and the parties and issued an order that reasonably accommodated their competing interests.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989 – 241 699/00168